

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 13, 2007

STATE OF TENNESSEE v. WILLIAM ROBERT HURT

Direct Appeal from the Circuit Court for Marshall County
Nos. 16910, 17027, 17028 Robert Crigler, Judge

No. M2006-01222-CCA-R3-CD - Filed June 12, 2007

Pursuant to a plea agreement, the defendant, William Robert Hurt, entered guilty pleas to three counts of possession of a schedule II controlled substance with intent to sell or deliver. As a result, he received a total effective sentence of ten years with the manner of service to be determined by the circuit court. After a sentencing hearing, the court ordered the defendant to serve his sentence in confinement but on work release subject to the county sheriff's approval. On appeal, the defendant challenges the circuit court's denial of alternative sentencing. Following our review of the parties' briefs and applicable law, the judgment of the court is affirmed. However, we are unable to reconcile the sentence pronounced by the trial court at the sentencing hearing with the sentence reflected by the judgment of conviction presented on appeal. Accordingly, we remand for clarification or correction of the sentence as reflected in the judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Andrew Jackson Dearing, III (on appeal and at trial) and Michael J. Collins (at trial), Assistant Public Defenders, Shelbyville, Tennessee, for the appellant, William Robert Hurt.

Robert E. Cooper, Jr., Attorney General and Reporter; Brian Clay Johnson, Assistant Attorney General; W. Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In October of 2005, the defendant was charged with multiple counts of possession of controlled substances with intent to sell or deliver. In January 2006, the defendant was also charged with the sale or delivery of cocaine. Thereafter, the defendant pled guilty to three counts of

possession of a schedule II controlled substance with intent to sell or deliver, and the remaining counts were dismissed. For his convictions, the defendant received concurrent ten-year sentences with the manner of service to be determined by the circuit court.

At the sentencing hearing, Beth Flatt testified that she worked for the Tennessee Probation and Parole Department and prepared the defendant's presentence report. She corroborated the facts underlying the defendant's convictions for possessing illegal drugs with the intent to sell or deliver them. She also testified, in pertinent part, that the defendant gave his version of the facts surrounding his convictions in the presentence report where he admitted to selling cocaine in Marshall County twenty times. He said he sold the drugs to "make a little money" to buy food.

Beth Flatt also testified regarding the presentence report. The presentence report indicated that the defendant was convicted of failure to appear (misdemeanor) in the Maury County General Sessions Court whereupon his probation for another offense was revoked. The defendant was also convicted of failure to appear (misdemeanor) in the Marshall County General Sessions Court. The defendant was ordered to serve 30 days for a probation violation out of the Lewisburg City Court. Additionally, the defendant had been convicted of driving on a revoked license, driving under the influence, misdemeanor possession of cocaine, misdemeanor possession of drugs, and several traffic offenses. Mrs. Flatt further noted that the presentence report revealed that the defendant was found to have violated probation in October 2005, but his probation was reinstated two months later. According to Mrs. Flatt, the defendant graduated from high school, and had a sixteen-year-old daughter who lived with her brother. The defendant also admitted to using powder cocaine once a week during the summer of 2005.

The defendant testified that he sold drugs to make a little money to buy food because he "didn't have a job. No income. [He] just tried to make a little easy source of money." The defendant recalled that he worked as a machine operator at Heil Quaker from June 20, 1983 to December 15, 2002 until the plant shut down. The defendant then worked for a subsidiary company, ICP, as a fork lift operator, until he was laid off in October of 2005. The defendant recounted that he had minor problems with the law prior to being laid off in 2005. The defendant noted that he had been in jail for 120 days, but he claimed that he could go back to work for ICP if given the opportunity. The defendant also stated he had a "real close" relationship with his daughter.

On cross-examination, the defendant acknowledged that his daughter was living with her brother during the time he was selling drugs. When asked if he was starving or missing meals, the defendant replied, "No." The defendant also acknowledged that he could have probably turned to his family for food.

Paula Hurt Walker, the defendant's older sister, testified that the defendant could get his old job back and could start work next week. She stated that the defendant was loved by his family. She also stated that the defendant could live with her if released. She further stated that she visited the defendant in jail every Sunday and the defendant showed remorse for his mistakes.

At the conclusion of the hearing, the circuit court stated the following:

[C]onfinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide effective deterrent to people likely to commit similar offenses.

I do find that that does apply.

. . . less restrictive measures than [confinement] have frequently or recently been applied to the defendant.

I do find that applies also.

As I understand it, he has a probation violation on May 16, '05, where he got 30 days. I believe that was in sessions court here for a probation violation.

. . . .

Then he has a failure to appear. The first entry says probation revoked in full. Then, I believe, . . . there is the Maury County probation violation.

Even though those are misdemeanors, those are unsuccessful efforts at less restrictive measures where he has had probation violated.

The court then denied the defendant's request for alternative sentencing, but granted the defendant work release subject to the approval of the local sheriff. Interestingly, however, the trial court noted on the defendant's judgment of conviction that he was being sentenced to the Tennessee Department of Correction.

ANALYSIS

The defendant's sole issue on appeal is whether the trial court erred in denying alternative sentencing and imposing full confinement. Specifically, he submits that he should have received alternative sentencing such as probation because he does not possess a "criminal history evincing a clear disregard for the laws of society."

When an accused challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence

is erroneous. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

A defendant is presumed to be a favorable candidate for alternative sentencing if the defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. *Id.* § 40-35-102(6). However, this presumption is unavailable to a defendant who commits the most severe offenses, has a criminal history showing clear disregard for the laws and morals of society, or has failed past efforts at rehabilitation. *Id.* § 40-35-102(5); *State v. Fields*, 40 S.W.3d 435, 440 (Tenn. 2001). Pursuant to Tennessee Code Annotated section 40-35-103, a trial court is “encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation and/or community service.” However, a trial court may determine incarceration rather than alternative sentencing is appropriate if the evidence shows that:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1)(A)-(C). As part of its determination, the trial court may also consider the defendant’s potential or lack of potential for rehabilitation. *Id.* § 40-35-103(5). There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. Tenn. Code Ann. § 40-35-103(2); *State v. Boggs*, 932 S.W.2d 467, 476-77 (Tenn. Crim. App. 1996).

In this case, the defendant was eligible for alternative sentencing because his actual sentence was ten years or less and the offense for which he was sentenced was not specifically excluded by statute. *See* Tenn. Code Ann. §§ 40-35-102(6) & -303(a). However, the defendant was not entitled to the presumption of favorable candidacy for alternative sentencing because he pled guilty to a Class B felony. Tenn. Code Ann. § 40-35-102(6). As a result, the burden of establishing suitability for alternative sentencing rested with the defendant. *State v. Curtis Lee Thames*, No. E2005-00895-CCA-R3-CD, 2006 WL 1097447, *2 (Tenn. Crim. App., at Knoxville, Apr. 7, 2006) (noting that a defendant convicted of a Class B felony has the burden of proving his worthiness for alternative sentencing).

Upon review of the record, we conclude that the circuit court properly denied the defendant's request for alternative sentencing as the record supports its finding that measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. Accordingly, the defendant has not met his burden of establishing any sentencing error by the circuit court, and he is not entitled to relief on this issue. However, we remand for clarification or correction of the judgment of conviction as the trial court, pursuant to state statute, may not permit the defendant to serve his ten-year sentence in the county jail, or order work release subject to the local sheriff's approval once the defendant has been transferred to the Tennessee Department of Correction. *See e.g.*, Tenn. Code Ann. §§ 40-35-314, -212.¹

CONCLUSION

Finding no error, the judgment of the circuit court is affirmed. However, we remand for clarification or correction of the sentence as reflected in the judgment.

J.C. McLIN, JUDGE

¹ “If confinement is directed, the court shall designate the place of confinement as a local jail or workhouse if required pursuant to § 40-35-104(b) or, *if the sentence is eight (8) years or less and combined with periodic or split confinement not to exceed one (1) year, the court shall designate the place of confinement as a local jail or workhouse.* . . . After November 1, 1989, if a court sentences or has sentenced a defendant to a local jail or workhouse when the court was not authorized to do so by this chapter, it shall be deemed that the sentence was a sentence to the department, and the commissioner of correction shall have the authority to take the defendant into the custody of the department.” Tenn. Code Ann. § 40-35-314 (emphasis added).

“*Unless the defendant receives a sentence in the department, the court shall retain full jurisdiction over the manner of the defendant's sentence service.*” Tenn. Code Ann. § 40-35-212 (emphasis added).